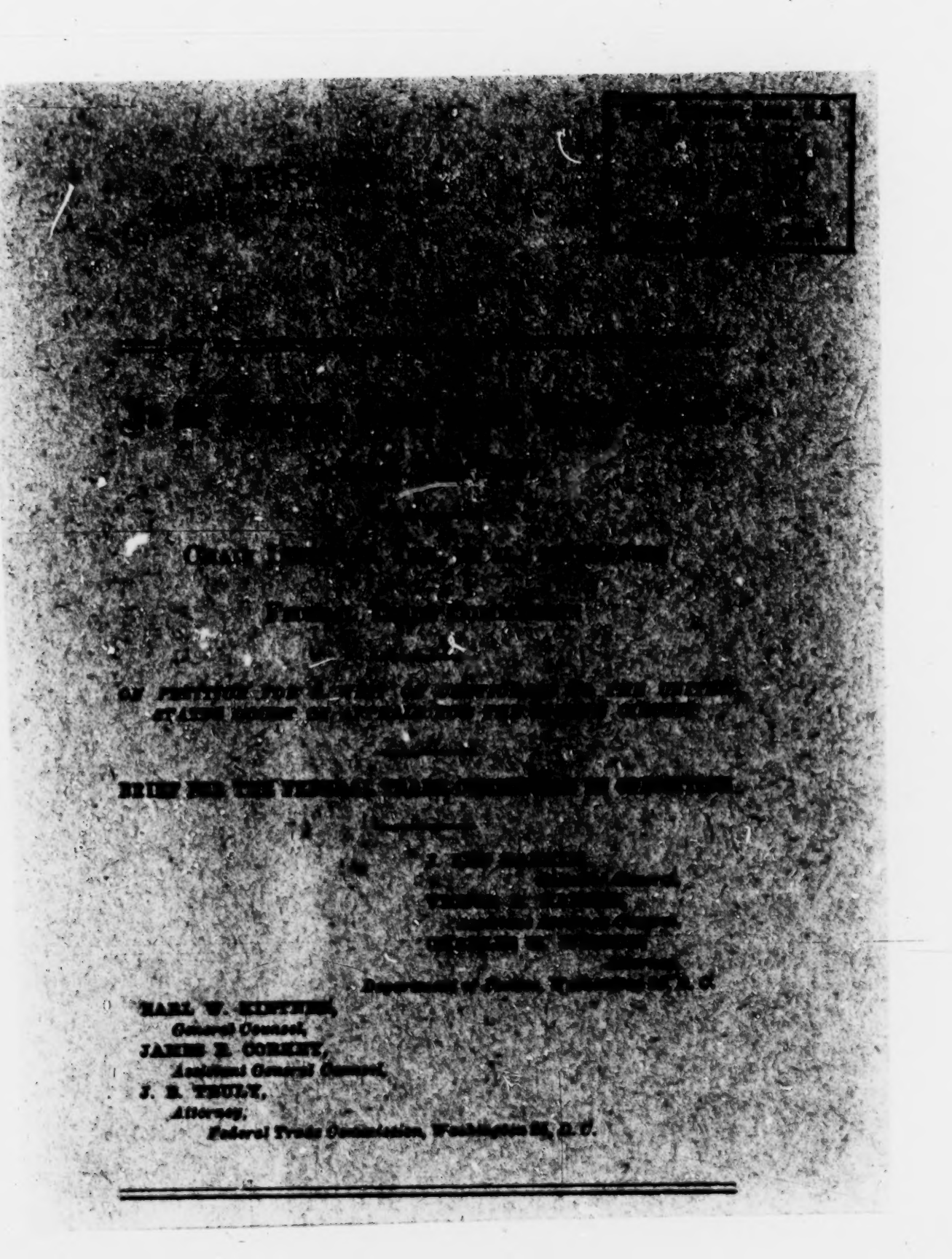

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 554

CHAIN INSTITUTE, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 29–44) is reported at 246 F. 2d 231. The Commission's findings, conclusion and order and the dissenting opinion of Commissioner Mason (R. 592–622) are reported at 49 F. T. C. 1041, 1069–1110.

JURISDICTION

The judgment of the Court of Appeals (Pet. 45–46) was entered on July 19, 1957. The petition for a writ of certiorari was filed on October 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission, having found that petitioners have long been parties to a conspiracy to fix delivered prices, properly directed petitioners to cease and desist from continuing the use, pursuant to agreement, of the delivered price systems without which the purposes of the conspiracy could not have been accomplished.

2. Whether the Commission acted within its allowable discretion in directing the petitioners individually to cease and desist from selling any type of chain pursuant to a single basing point system, a freight equalization system or a zone price system, having the purpose or effect of systematically matching the delivered prices of other sellers.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45, provides in pertinent part as follows:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition * * * it shall

issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing * * *. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business * * *. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

The Commission's amended complaint (R. 41–79) was issued in 1945 (R. 79). It charged in Count I (R. 41–71), under which the order was issued, that petitioners had violated Section 5 of the Federal Trade Commission Act by combining and conspiring to restrain and suppress competition in the sale of three types of chain, and that this was accomplished

primarily by agreeing upon published mill prices and by charging the same delivered price to buyers at any given location through the use as to "welded chain" of a single basing point delivered price system, as to "weldless chain" of a freight equalization delivered price system, and as to "tire chain" of a zone delivered price system (R. 52–55, 64–71). It charged that petitioners had "agreed to fix and maintain, and have fixed, maintained and made effective identical delivered price quotations" to buyers at any given location in the United States (R. 52), and that the use by each petitioner of the three delivered price systems had "prevented the principles and forces of competition from making and determining their respective price quotations" (R. 53). It charged that each seller of chain had employed the three delivered price systems with knowledge that each other seller "simultaneously does likewise" (R. 64), and that this was done "for the purpose and with the effect" of "matching" delivered prices on all types of chain (R. 65–69).

Count II of the amended complaint (R. 72–78), dismissed by the Commission (R. 652), charged that petitioners had sold their chain at discriminatory prices in violation of Section 2 (a) of the Clayton Act (15 U. S. C. 13 (a)).

After an extensive hearing, the Commission made detailed findings of fact (R. 592–652), and concluded that petitioners' agreements and understandings, and their acts pursuant thereto, violated Section 5 (R. 652), and issued its order to cease and desist (R. 653–657).

The Commission found that the petitioners sell "substantially all the welded chain, weldless chain, including sash and kindred chain, and tire chain produced in the United States" (R. 603).[1] They agreed with each other to sell chain at uniform delivered prices (R. 649–650). Each manufacturer, for the purpose and with the effect of matching delivered prices with other manufacturers at all destinations and thus eliminating competition, determined its delivered prices as to welded chain by the use of the Pittsburgh plus delivered price system,[2] as to weldless chain by the use of a freight equalization delivered price system under which every point of manufacture is a basing point, and as to tire chain by the use of a one-zone delivered price system (R. 604–9).

Petitioners do not contest the evidentiary support for the Commission's finding of an agreement to fix basic prices. They do contend, though the court below held to the contrary (Pet. 38), that there was no support for the Commission's finding (R. 650–651) that the delivered price systems, without which the purposes of the conspiracy could not have been accomplished, were used pursuant to agreement (Pet. 7).

Petitioners contest the validity only of subparagraph (6) of the first ordering paragraph and the

[1] While the case was pending in the Court of Appeals Republic Steel Corporation, not a party to the Commission proceeding, purchased the assets of five affiliated corporate manufacturers of chain which were parties, and the Court, pursuant to motion and with the Commission's consent (Pet. 47–52), dismissed the petition to review as to these five corporations (Pet. 53–54).

[2] The Commission found that since the commencement of the proceeding two petitioners had ceased using this system (R. 605).

third ordering paragraph of the Commission's cease and desist order (R. 653–657), both of which deal with the three delivered price systems. Subparagraph (6) of the first ordering paragraph prohibits petitioners from entering into or carrying out any planned common course of action, agreement or conspiracy to (R. 655)—

> Quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with the single basing point delivered-price system, the freight equalization delivered-price system, or the zone delivered-price system; or quote or sell chain or chain products at prices calculated or determined pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for chain or chain products at points of quotation or sale or to particular purchasers by any two or more sellers of chain or chain products using such plan or system or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

The third ordering paragraph is identical in plan with the order reviewed by this court in *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 423. It requires each manufacturer petitioner to cease and desist from (R. 656–657)—

> quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quota-

> tions or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

The majority of the Commission did not issue a separate opinion to accompany its findings. In the *National Lead* case, which was decided by the Commission a little more than a month before the decision in this case, the Commission filed a lengthy opinion, prepared by Commissioner Mead, setting forth in detail the necessity for the provision in order to break up the conspiracy (49 F. T. C. 875–889). Commissioner Mason filed a dissenting opinion in that case (*id.*, 889–907). Commissioner Mason also filed a dissenting opinion in this case (R. 658–659), incorporating a portion of his opinion in the *National Lead* case (R. 659–662). He said that it was his belief that the third ordering paragraph was improperly included for the reasons he had objected to with respect to the inclusion of the comparable provision in the *National Lead* order.

A motion for rehearing was filed with the Commission and was denied (R. 663–665). The motion did not allege any change in fact or law, and the Commission denied it on the ground that it was largely predicated upon a change in membership of the Commission following the decision (R. 665–667). At the time of the order denying the motion Commissioner Mead was the only remaining member of the Commission who had voted with the majority in issuing the order to cease and desist (R. 665). He filed a concurring opinion on

the motion, stating in detail the reasons the third ordering paragraph had been included in the order (R. 668–674). His opinion stated that the prohibition was "necessary for effective relief from the conspiracy in which the respondents [petitioners] have engaged," and that the Commission "had the duty to determine the remedy necessary to suppress and insure against a revival of the trade-restraining conspiracy" (R. 669); that "we considered a number of factors" in determining the remedy; that "A majority of the Commission was of the opinion that an effective order" (R. 669–670) must prohibit not only the future use of the delivered-price systems pursuant to conspiracy, "but must also prohibit the individual use of a particular delivered pricing system or method" for the purpose or with the effect of systematically matching delivered prices of other sellers (R. 670); that "Such a prohibition was necessary * * * to make the order fully effective against the trade-restraining conspiracy," (R. 670) and that "an order merely prohibiting the combination may well be a useless gesture" (R. 671).

The Court of Appeals unanimously affirmed the Commission's findings, conclusion and order in every respect.

ARGUMENT

1. The Commission, having found that petitioners for many years had been parties to a price-fixing conspiracy, the existence of which is not contested,

[1] Some of the exhibits upon which the Commission relied in part in finding the existence of a conspiracy were dated in 1937 (R. 612-613, 628–630), antedating the Commission's order, issued in 1953 (R. 657), by sixteen years.

had the duty to prohibit the further use pursuant to agreement of the methods by which identity of delivered prices is accomplished. Delivered price systems, where used as a part of a scheme to fix prices and restrain trade, have many times been prohibited by the Commission in conspiracy orders which regularly have been affirmed by this Court and by courts of appeals.[4] Hence, the petition fails in this respect to present a question of federal law which has not been decided by this Court. And to the extent petitioners request further review of the evidence and inferences to be drawn therefrom, certiorari clearly is not warranted. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

Moreover, petitioners misconceive the basis for the Commission's finding that the three delivered price systems were employed pursuant to agreement (Pet. 23-25). The findings of conspiracy were not based on

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[4] Single basing point delivered price system: *United States Maltsters Ass'n.* v. *Federal Trade Commission*, 152 F. 2d 161 (C. A. 7); freight equalization basing point delivered price system: *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478 (C. A. 7); *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F. 2d 974 (C. A. 4); zone delivered price system: *Salt Producers Ass'n.* v. *Federal Trade Commission*, 134 F. 2d 354 (C. A. 7); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899 (C. A. 7), certiorari denied, 329 U. S. 795; *Allied Paper Mills* v. *Federal Trade Commission*, 168 F. 2d 600 (C. A. 7), certiorari denied 336 U. S. 918; *National Lead Company* v. *Federal Trade Commission*, 227 F. 2d 825 (C. A. 7), cross petition for certiorari denied, 351 U. S. 964; multiple basing point delivered price system: *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683; *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 F. 2d 175 (C. A. 7), affirmed *sub nom. Clayton Mark & Co.* v. *Federal Trade Commission*, 336 U. S. 956.

conscious parallel action but on voluminous evidence of agreement. The Commission found that there was substantial evidence that "present and future prices * * * were discussed and agreed upon" on the occasion of meetings of petitioner Chain Institute, Inc., the trade association (R. 609–617); that pursuant to agreement published mill prices were identical at all times (R. 639–641); that a system of checking on the maintenance of delivered prices was fostered and carried out by the Institute (R. 618–628); that correspondence between petitioners showed the existence of an agreement to fix delivered prices (R. 628–632); that successful efforts to standardize and simplify products, which aided price fixing, were continuously carried on through the Institute (R. 632–637); that freight rates on welded chain from Pittsburgh to destinations throughout the United States were cooperatively compiled and used by petitioners and that the compilation was "not intended to serve any need for freight rate for shipping purposes but was designed for use in computing delivered prices * * *". (R. 637–639); that delivered prices on all types of chain have been "generally uniform" (R. 641) as a result of "the use of identical pricing systems or methods * * *" (R. 641–642).

The Commission plainly was entitled to find on this record, where the delivered price systems maintain uniformity of price, that the systems were used pursuant to agreement. As the Court of Appeals held, citing *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, the evidence supports the Commission's finding "that the delivered pricing methods

used by petitioners in connection with and in furtherance of their cooperative and collusive efforts to fix or stabilize prices for chain were necessarily an inherent and indispensable part of the conspiracy" (Pet. 38).[4] And the fact that the systems had been used historically in the industry since its inception is inconclusive because it is clear that they were used by agreement and understanding for the purpose and with the effect of eliminating price competition. As the Commission found, the purpose of arriving at identical delivered prices could not have been accomplished without the use of these systems (R. 650).[5]

The Commission did not exceed its authority, therefore, by ordering petitioners to discontinue the use pursuant to conspiracy of the methods of pricing and selling chain that in the past have been the means by which the unlawful restraints upon trade were accomplished.[6]

2. The Commission's authority in a conspiracy case to limit the individual use of a delivered price system, where necessary to destroy the impetus of the conspiracy, was settled by the Court's decision in *Federal Trade Commission* v. *National Lead Co.*, 352

[4] Two Courts of Appeals have said that "it taxes our credulity to believe, as argued, that petitioners employed this [freight equalization] system without any agreement or plan among themselves." *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478, 481-482 (C. A. 7); *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F. 2d 974, 980 (C. A. 4).

[5] The Court held in *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436, 461, that the lower court "properly suppressed the means by which the unlawful restraint was achieved." See also *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, 430.

U. S. 419. Petitioners acknowledge this, but argue that for various reasons the decision in *National Lead* is not controlling here.[7]

It is asserted that since the third ordering paragraph here limits the use of three delivered price systems, as opposed to the limitation of the use of one such system in *National Lead*, it is too broad (Pet. 12–15). It is apparent that the *National Lead* order related only to the zone delivered price system because that was the only system used pursuant to conspiracy in the sale of lead pigments. The order here applies to the three systems because in the sale of chain petitioners pursuant to conspiracy have used all three systems. The Court of Appeals, in holding that the Commission made an allowable judgment in its choice of the remedy necessary in order effectively to bring to an end the past unlawful practices, recognized that the order properly guarded against interchanging, as among the three types of chain, the systems previously used, thus perpetuating the restraints of trade at which the order is directed (Pet. 39).[8]

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[7] Petitioners' argument that the pricing systems anteceded the conspiracy and agreement and therefore have an independent legitimate economic basis (Pet. 10–12) is discussed at page 11, *supra*.

[8] The possible interchange of pricing systems used may already have occurred as to welded chain. Petitioners say they believe that "the normal and lawful purpose and effect of any delivered pricing method" is systematically to match delivered prices of competitors (Pet. 13). They advise that the Pittsburgh plus system "is generally regarded as outmoded," and that "counsel are informed that the Pittsburgh Plus method is no longer used by any of the petitioners" (Pet. 11, n. 36). They do not inform the Court as to the method by which welded chain is currently priced.

Contrary to petitioners' contention (Pet. 19–21), the Commission did consider the necessity for the remedy selected.[9] Commissioner Mead, in his concurring opinion on the motion for rehearing, said that the Commission had fully considered the necessity for the third ordering paragraph (R. 668–674). He said that "we considered a number of factors" in determining the necessity of providing a remedy "to suppress and insure against a revival of the trade-restraining conspiracy" (R. 669). He also said that "A majority of the Commission was of the opinion that an effective order" must prohibit the individual use of the three delivered price systems "for the purpose or with the effect of systematically matching" delivered prices of other sellers of chain (R. 669–670). There is no basis, therefore, for petitioners' contention that the Commission gave no consideration to the necessity of the remedy.[10]

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[9] The petitioners specifically argue against the order as it applies to the zone system used in the sale of tire chain (Pet. 15–16). Under this system the petitioners' published mill prices are, pursuant to agreement, identical and the chain is sold at all delivery points in the United States at these published prices, the seller paying the freight. Chain, unlike chewing gum and cigarettes (Pet. 16), is a heavy commodity. The average cost of delivery of tire chain to all destinations in the United States is about 5½ percent of the published price (Pet. 12, fn. 37). As in the cases cited in footnote 4, page 9, *supra*, the Federal Trade Commission found that this system was part of the unlawful practice. The court below found that the Commission had a basis in the record for such a finding and had not abused its discretion in forbidding future use of the system. Under these circumstances there is no ground for review by this Court.

[10] Petitioners also argue that the Commission gave no consideration to the economic effects of the order, having contended throughout this proceeding that the order requires them to sell

Except that it applies to more than one delivered price system, the order here is to be interpreted in exactly the manner this Court interpreted the *National Lead* order. The order does not require f. o. b. mill selling and "delivered pricing *per se* is not banned by the order" (352 U. S. at 425).[11] As the Court said in *National Lead*, "delivered zone pricing violates the order only when two conditions are present: (1) identical prices with competitors (2) resulting from zone delivered pricing" (352 U. S. at 426). So, here, the order will be violated only if "systematically matching" prices result from a single basing point, freight equalization, or zone delivered price system.

Petitioners can comply with the order by competing instead of agreeing upon base prices. It will remain lawful to meet in good faith the lower prices of a competitor, no matter what system of delivered pricing is used. Here, as in *National Lead*, Section 2 (b) of the Clayton Act is fully applicable. As this Court

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f. o. b. mill. In this connection the record shows that under the conspiracy count of the complaint they requested the Hearing Examiner to find that an order requiring f. o. b. mill selling would be economically disastrous (par. 10 (j) of petitioners' proposed findings, R. 351[*], and excepted to the examiner's refusal to make the finding (exception 75, R. 506). The Commission specifically ruled upon and denied the exception (R. 574-575).

[11] The Court of Appeals recognized that the order does not *per se* prohibit the use of any delivered price system, saying (Pet. 38-39): "If this paragraph of the order of the Commission were to be given the effect of depriving each of the petitioners of every lawful and practical method of independently and honestly selling its products at delivered prices, and thus preventing it from engaging in nationwide competition, we would consider the paragraph invalid."

stated (352 U. S. 419, at 426–427, 431), it is read into every Commission order and the particular type of order, like the order here in question, "was not intended to and does not prohibit or interfere with independent delivered * * * pricing *per se*. Nor does it prohibit the practice of the absorption of actual freight as such in order to foster competition."

As to the duration of the third ordering paragraph, the order here is temporary in the same sense the order in *National Lead* was temporary. There the Court said: "When and if competition is restored and the individual prohibition is no longer necessary, the Commission expressed its intention, upon application, to vacate the * * * provision of its order" (325 U. S. at 424–425). So, here, Commissioner Mead said in his opinion on the motion for rehearing (R. 671–672):

> If, after competition is restored in the industry, any of the respondents can make a proper showing that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission, of course, will at that time take such action as may be appropriate in the light of the facts and the law.

Petitioners also contend, as was contended in *National Lead*, that due process was denied because they had no opportunity to argue before the Commission the validity of the third ordering paragraph (Pet. 22–23). Here, as there, the insertion of the paragraph "was nothing more than a mode of implementation, selected by the Commission, to enforce its findings of violations of the Act" (352 U. S. at 427). The Commission is charged by the Federal Trade Commission

Act with fashioning the remedy. Since the reasonableness of the remedy depends upon the nature of the violation and the means adopted to accomplish it, the entire proceeding with respect to the violation is in substance a hearing on the remedy. Due process does not require a compartmentalization of the proceedings.

The Court of Appeals held that the Commission did not act arbitrarily or abuse its discretion by including the third ordering paragraph in the order (Pet. 40–41). Since this Court held in *National Lead* that the Commission's selection of an identical remedy had a "reasonable relation to the unlawful practices found to exist" (352 U. S. at 428), the petition presents no question of importance that has not been settled by the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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